Attachment 3

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Case File N° 004/19-01-2012-ECCC/PTC

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Chang-Ho CHUNG
Judge HUOT Vuthy

Date: **23 February 2012**

PUBLIC

OPINION OF PRE-TRIAL CHAMBER JUDGES DOWNING AND CHUNG ON THE DISAGREEMENT BETWEEN THE CO-INVESTIGATING JUDGES PURSUANT TO INTERNAL RULE 72

Co-Investigating Judges:

YOU Bunleng
Laurent KASPER-ANSERMET

Office of Administration:

KRANH Tony
Knut ROSANDHAUG

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of a Disagreement between the Reserve International Co-Investigating Judge and the National Co-Investigating Judge forwarded by the Office of Administration pursuant to Internal Rule 72, as the Reserve International Co-Investigating Judge proposes to issue a Rogatory Letter on the continuation of the judicial investigation in Case file 004 (the "Proposed Rogatory Letter")[1] and the National Co-Investigating Judge disagrees (the "Disagreement").[2]

I. BACKGROUND AND SUBMISSIONS

1. On 20 November 2008, the then International Co-Prosecutor filed the "Third Introductory Submission"[3] with the Co-Investigating Judges requesting them to begin a judicial investigation in Case 004.

2. On 1 December 2010 Judge Laurent Kasper-Ansermet was appointed by His Majesty the King Norodom Sihamoni as the Reserve International Co-Investigating Judge[4] and on 21 February 2011 Judge Kasper-Ansermet was sworn in before the ECCC Plenary.[5] Both these facts are a matter of public record.

3. On 15 June 2011 the International Co-Prosecutor filed with the Office of the Co-Investigating Judges a Request for Investigative Action regarding [redacted].[6]

4. On 10 October 2011, the International Co-Investigating Judge issued a press release advising that "as a result of repeated statements [from the Royal Government of the Kingdom of Cambodia regarding a policy of statements prohibiting further investigations], which will be perceived as attempted interference by Government officials in Case 003 and 004, the International Co-Investigating Judge has submitted his resignation to the Secretary-

[1] Record of Disagreement of 19 January 2012, Attachment 3.1 (the "Proposed Rogatory Letter").
[2] Record of Disagreement, 19 January 2012.
[3] Co-Prosecutor's Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.
[4] Press Release "Dr Siegfried Blunk Appointed as New International Co-Investigating Judge", 1 December 2010, http://www.eccc.gov.kh/sites/default/files/media/ECCC_1_Dec_2010_(Eng).pdf
[5] Public Opening Speech of President Kong Srim at the ECCC Plenary of 21 February 2011.
[6] Proposed Rogatory Letter, sixth paragraph.

General as of 8 October 2011."[7] The resignation took effect on 31 October 2011.

5. We note that on 6 December 2011, the Reserve International Co-Investigating Judge issued a press release announcing the following:

> "PRESS RELEASE
> BY THE INTERNATIONAL RESERVE CO-INVESTIGATING JUDGE
>
> Appointed to the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the period of the proceedings by Royal Decree dated 30 November 2010, with the approval of the Supreme Council of Magistracy of the Kingdom of Cambodia, and sworn in on 21 February 2011, the international reserve Co-Investigating Judge is called upon under the law to replace his predecessor and to assume the duties performed by the latter up until his unexpected resignation effective 31 October 2011 (Articles 12, 23, 26 and 27 of the ECCC Law).
>
> After having executed his mandate by remote means from abroad since 14 November in accordance with ECCC Internal Rule 14 (6), the international reserve Co-Investigating Judge has now assumed his office in Phnom Penh. In keeping with the principle of due diligence (Internal Rule 21(4)), the international reserve Co-Investigating Judge, working in conjunction with his national colleague, will undertake any necessary investigative/judicial actions, as well as the measures for the administration of his Office.
>
> The international reserve Co-Investigating Judge, working in conjunction with his national colleague, will in accordance with ECCC Internal Rule 56 (2) endeavor to keep the public sufficiently informed about major developments in Case Files 003 and 004."[8]

6. We also note that on 6 December 2011, in response to the Reserve International Co-Investigating Judge's press statement, the National Co-Investigating Judge issued a statement announcing the following:

> "PRESS STATEMENT OF THE NATIONAL CO-INVESTIGATING JUDGE
> *(unofficial translation)*
>
> Today, as the reserve international Co-Investigating Judge Laurent Kasper-Ansermet issued a press statement without any consultation with the national Co-

[7] Press Release by the International Co-Investigating Judge, 10 October 2011, http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20(Eng).pdf

[8] Press Release by the International Reserve Co-Investigating Judge, 6 December 2011, http://www.eccc.gov.kh/en/articles/statement-international-reserve-co-investigating-judge

Investigating Judge, the national Co-Investigating Judge would like to announce as follows:

1. After the resignation of the international Co-Investigating Judge Siegfried BLUNK on October 9, 201, a new international Co-Investigating Judge has yet to be officially appointed until now.

2. On 5th December 2011, the national Co-Investigating Judge met with the reserve international Co-Investigating Judge Laurent Kasper-Ansermet at the Office of the Co-Investigating Judges and informed Judge Laurent Kasper-Ansermet that to ensure the legal correctness (in accordance with the principles stipulated in Rule 7.4 of the Internal Rules, Articles 26 and 27 of the Law on the Establishment of the ECCC and Article 3 and Article 5.6 of the Agreement) as well as to ensure the common practices applied so far on the precedent international Co-Investigating Judges, a reserve international Co-Investigating Judge must first wait for an official appointment before commencing his duties. For this reason, any procedural action taken by Judge Laurent Kasper-Ansermet is not legally valid."[9]

7. On 23 December 2011, the Reserve International Co-Investigating Judge forwarded the Proposed Rogatory Letter to the National Co-Investigating Judge seeking his perusal and agreement to issue it. The Reserve International Co-Investigating Judge's proposal concludes that "the urgent necessity to continue the investigation into [Case] 004 forces me to take action despite your reservations."[10] According to the Record of the Disagreement, the National Co-Investigating Judge has "neither acknowledged receipt nor communicated his decision" to the Reserve International Co-Investigating Judge.[11] The Reserve International Co-Investigating Judge further notes that "whether or not the National Co-Investigating Judge wants to continue the judicial investigation in Case File 004, it is worth pointing out [that] the contracts of all his investigators were not renewed as from 31 December 2011."[12] He further notes that "in any event, by his attitude, the National Co-Investigating Judge is still unwilling to address the substance of the Rogatory Letter [...] as stated in his statement of principle formalized by letter, dated 5 December 2011 (Annex 2)."[13] The letter of 5

[9] Press Release of the National Co-Investigating Judge (unofficial translation), 6 December 2011, http://www.eccc.gov.kh/sites/default/files/media/5-Corrected%20English%20version%20of%20Press%20Statement%20National%20CIJ%20December%206%20Final.pdf

[10] Record of Disagreement, Attachment 3.1.

[11] Record of Disagreement, eighth paragraph.

[12] Record of Disagreement, ninth paragraph.

[13] Record of Disagreement, tenth paragraph.

December 2011 from the National Co-Investigating Judge directed to the Reserve International Co-Investigating Judge reads that "[the National Co-Investigating Judge] could only discuss about the substances of the proceedings with [the Reserve International Co-Investigating Judge] only after [he is] officially nominated by the Supreme Council of the Magistracy of the Kingdom of Cambodia."[14]

8. On 19 January 2012, the Reserve International Co-Investigatnig Judge submitted a Record of Disagreement and related documents to the Office of Administration. On the same day of 19 January 2012, the documents were communicated, pursuant to Internal Rule 72 by the Acting Director of the Office of Administration to the President of the Pre-Trial Chamber with a copy to the National Co-Investigating Judge.

9. We note that in considering our opinion we have been mindful of the fact that the National Co-Investigating Judge had the opportunity within 10 days of the submission of the Record of Disagreement to the Office of Administration to respond to and submit counter or alternative arguments to all of the submissions and assertions made by the Reserve International Co-Investigating Judge in respect of the Disagreement and in respect of the issue of standing of the Reserve International Co-Investigating Judge.[15] The National Co-Investigating Judge chose not to do so, as no response was received.[16]

10. The Reserve International Co-Investigating Judge in his submission notes the existence of "a disagreement between the Co-Investigating Judges with regard to both the admissibility and substance of the [Proposed] Rogatory Letter."[17] He submits that "by definition, a reserve Co-Investigating Judge is called upon to replace a co-investigating judge," that "to accept the opinion of the National Co-Investigating Judge would lead to crippling the functioning of the Office of the Co-Investigating Judges [...] and this is precisely what instituting the

[14] Record of Disagreement, Annex 2.
[15] See Internal Rule 72.2.
[16] We also note that, the Proposed Rogatory Letter, pursuant to Internal Rule 55, is an investigative act that may bring cause for an appeal by the concerned party and would, therefore, fall within the ambit of Internal Rule 72(4)(b). This means that, pursuant to Internal Rule 72(2), the record of the disagreement should have been placed on the case file and the concerned parties informed. However, todate, none of this has happened and therefore the Co-Prosecutros who are directly concerned with the result of this procedure have not had a chance to provide their submissions either.
[17] Record of Disagreement, last paragraph.

position of reserve co-investigating judge is designed to avoid" and that such "would be contrary to the due diligence principle."[18]

II. EXPRESSION OF OPINION AND CONCLUSION

11. We find that the Pre-Trial Chamber has jurisdiction over the subject of the Disagreement as it is relates to the admissibility of a Proposed "Rogatory Letter on the continuation of the judicial investigation in Case File 004"[19] which pursuant to Artilce 7 of the ECCC Agreement "shall be settled forthwith by a Pre-Trial Chamber of *five* judges."

12. Despite its efforts the Pre-Trial Chamber had not attained the required majority of four affirmative votes in order to reach a decision on whether Judge Kasper-Arsenet has standing to bring a Disagreement before the Pre-Trial Chamber and had therefore adjourned its deliberations on the Disagreement. However, without disclosing the substance of the deliberations, we have to note that the Pre-Trial Chamber's deliberations were interupted due to the following sequence of events:

(i) On 23 January 2012, the Judges of the Pre-Trial Chamber were informed by email from a National Pre-Trial Chamber Associate Legal Officer that a deliberation was to be convened on 24 January 2012 regarding the Disagreement. A subsequent email on 25 December 2012 advised that the deliberation of 24 January 2012 was postponed until Friday 27 January 2012. On 27 January 2012, the Judges of the Pre-Trial Chamber sat in a deliberation of the Disagreement (the "Deliberation"). Following the Deliberation, the Chamber adjourned deliberations to further consider the matters before it. On 3 February 2012, Judge Prak, the President of the Pre-Trial Chamber, issued an interoffice memorandum to the Acting Director of the Office of Administration stating that "the Pre-Trial Chamber brought into meeting the documents [relating to the Disagreement], however have not reached their consent to take into their consideration

[18] Record of Disagreement, p.2

[19] Record of Disagreement, fifth paragraph. *See also*: Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 (entered into force 29 April 2005), (the "Agreement"), Article 5(4).

of the substance of those documents." The memorandum further noted that "[h]aving seen that Mr Laurent Kasper-Ansermet does not have enough qualifications to undertake his duty according to legal procedure in force, the documents...shall be returned to the Office of Administration."[20]

(ii) On the same day, we communicated by a memorandum to the Acting Director of the Office of Administration, copying the National Judges of the Pre-Trial Chamber, informing him that the memorandum signed by the Pre-Trial Chamber's President forwarding back the documents pertaining to the Disagreement was issued prior to informing the International Pre-Trial Chamber Judges, and that the Pre-Trial Chamber had yet to complete deliberations. The memorandum also noted that the communication by Judge Prak did not represent the opinion of or a decision of the full Pre-Trial Chamber and amounts to a breach of confidentiality by a disclosure of the opinion of some of its judges prior to the conclusion of deliberations. The memorandum concluded that Judge Prak's memorandum had no legal effect on the outcome of the Disagreement cases, and in the event that at the end of its deliberations the Pre-Trial Chamber does not reach a majority of votes for its decisions on these cases, the judges shall, as required by law, append their opinion to the considerations of the full Pre-Trial Chamber.

13. Following a discussion over the telephone with the Judge Prak on 3 February 2012, and his subsequent refusal to withdraw the memorandum to the Director of Administration[21] we are left with no choice other than to accept that such memorandum is an expression of the opinion of Judges Prak, Ney and Hout. During the telephone conversation we were advised that Judges Prak, Ney and Huot regarded the matter of admissibility as only administrative. With respect to the action taken by Judges Prak, Ney and Huot, we are bound to determine the issue of admissibility as a judicial determination, consistent with the prior decisions of

[20] Interoffice Memorandom from Judge Prak of the Pre-Trial Chamber to the Office of Administration with subject: "Returning the documents communicated to Pre-Trial Chamber by the Office of Administration", dated 3 February 2012.

[21] *See also* Memorandum, dated 13 February 2012, from Judges Prak Kimsan, Ney Thol and Huot Vuthy directed to Judges Downing and Chung of the Pre-Trial Chamber with subject: "Decision of the National Judges to return the documents the Pre-Trial Chamber received to the Office of Administration," in which they maintain their previous position in this respect.

the Pre-Trial Chamber[22] and the law. The documents in a matter of this nature cannot be returned to the Administration of the Court as merely an administrative act. We are bound to provide a reasoned consideration of the matter before us in a proper and judicial manner. We do this in compliance with our duty to undertake our role as judges in conformity with the law and of our duties in office. We also are mindful of our Oath of Office, of the Bangalore Principles on Judicial Conduct[23] and of the Judicial Code of Ethics of the ECCC which we also apply when taking the most unusual course of issuing this opinion in this manner. No alternative is open to us.

14. As Internal Rule 72(4)(e) provides that the Chamber's decision shall be reasoned, in order to ensure transparency, the opinion of Judges Prak, Ney and Huot as set out in the memorandum of 3 February 2012 from Judge Prak to the Director of Administration is attached to this Opinion.[24]

15. We provide below the reasons for our opinion.

THE APPLICABLE LAW

16. The Pre-Trial Chamber notes that Article 3, paragraph 3 of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea dated

[22] See Case File No. 003/29-07-2011-ECCC/(PTC 01), Decision on Defence support section request for a stay in case 003 proceedings before the Pre-Trial Chamber and for measures pertaining to the effective representation of suspects in case 003, Doc. No. 3, 15 December 2011; Case File No. 002/07-12-2009-ECCC/PTC (05), Decision on Ieng Sary and Ieng Thirith Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, Doc. No. 8., 15 June 2010, para. 20; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, D250/3/2/1/5, 27 April 2010, para. 17; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 43), Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Matterial on the Case File dated 31 December 2009, D3/3/2/2, 20 May 2010, paras. 13 – 14; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 57), Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, D193/5/5, 4 August 2010, paras. 15 – 16; Application No. 002/08-07-2009-ECCC-PTC, Decision on the Charged Person's Application for Disqualification of Stephen Heder and David Boyle, Doc. No. 3, 22 September 2009, paras. 20, 22.

[23] *Bangalore Principles of Judicial Conduct*, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.

[24] Despite our written request, dated 7 February 2012, to the Pre-Trial Chamber Judges Prak Kimsan, Ney Thol and Huot Vuthy to provide reasons for their opinion, to date, we have received no response.

6 June 2003 (the "Agreement") states:

> "3. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."

17. Articles 5(1) and (4) of the Agreement respectively provide:

> "1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.
> [...]
> 4. The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7."

18. Article 7 of the Agreement further provides:

> "1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.
>
> 2. The difference shall be settled forthwith by a Pre-Trial Chamber of ***five judges***, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General. Article 3, paragraph 3, shall apply to the judges.
>
> 3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.
>
> 4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed" (emphasis added)."

19. Article 23 new of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of

Democratic Kampuchea dated 27 October 2004 (the "ECCC Law")[25] provides:

> "All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.
>
> In the event of disagreement between the Co-Investigating Judges the following shall apply:
>
> The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.
>
> The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.
>
> The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.
>
> Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.
>
> A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed."

20. Article 26 of the ECCC Law provides:

> "The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.
>
> *The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence.* These Investigating Judges may continue to perform their regular duties in their respective courts.

[25] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea dated 27 October 2004 (the "ECCC Law").

> The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations.
>
> The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge."

21. Article 27 new, paragraph 3 of the ECCC Law provides:

> "In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge."

22. The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia[26] (the "Internal Rules") state at Internal Rule 14 that in relation to the operation of the Office of the Co-Investigating Judges:

> "4. Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Investigating Judges may delegate power to one of them, by a joint written decision, to accomplish such action individually.
>
> 6. In the absence of a Co-Investigating Judge, actions that must be performed personally under these IRs may be accomplished by remote means.
>
> "7. In the event of disagreement between the Co-Investigating Judges, the procedure in Rule 72 shall apply."

23. The 'Fundamental Principles' as contained in Internal Rule 21, require that:

> "1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
>
> a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;
>
> [...]
>
> 4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time."

[26] The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 8) as revised on 3 August 2011 (the "Internal Rules").

24. Internal Rule 72 provides:

> "1. In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.
>
> 2. Within 30 (thirty) days, either Co-Investigating Judge may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges, with a copy to the other Co-Investigating Judge. If the disagreement relates to the Provisional Detention of a Charged Person, this period shall be reduced to 5 (five) days. The other Co-Investigating Judge may submit a response within 10 (ten) days. The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases referred to in sub-rule 4(b) below. The Greffier of the Co-Investigating Judges shall forward a copy of the case file to the Chamber immediately.
>
> 3. Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning:
>
> a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs;
>
> b) notification of charges; or
>
> c) an Arrest and Detention Order,
>
> in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.
>
> 4. The Chamber shall settle the disagreement forthwith, as follows:
>
> a) The hearing shall be held and the judgment handed down in camera.
>
> b) Where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs:
>
> i) The Greffier of the Chamber shall immediately inform the parties in question and their lawyers of the date of the hearing;
> ii) The Co-Prosecutors and the lawyers for the other parties involved may consult the case file up until the date of the hearing;
>
> iii) The Co-Prosecutors and the lawyers for the other parties involved may file pleadings as provided in the Practice Direction on filing of documents. Such pleadings shall immediately be placed on the case file by the Greffier of the Chamber;

iv) The Chamber may, on the motion of any judge or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or requests concerning jurisdiction or bars to jurisdiction, if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court;

v) During the hearing, the Co-Prosecutors and the lawyers of the other parties involved may present brief observations.

c) In all cases, the Chamber may, at its discretion, order the personal appearance of any parties or experts, as well as the production of any exhibits.

d) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 23 new of the ECCC Law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. However, where the disagreement concerns provisional detention, there shall be a presumption of freedom.

e) All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. The Greffier of the Chamber shall forward such decisions to the Director of the Office of Administration, who shall notify the Co-Investigating Judges. In addition, decisions concerning matters referred to in sub-rule 4(b) shall be notified to the parties. The Co-Investigating Judges shall place the decision of the Chamber on the case file and immediately proceed in accordance with such decision."

25. International Judges of the ECCC make the following written and oral declaration:

"I solemnly declare that I will perform my duties and exercise my powers as a judge of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea honourably, faithfully, impartially and conscientiously and that I will not seek or accept instructions in regard to the performance of those duties or the exercise of those powers from any Government or from any other source."

26. The Cambodian Judges of the ECCC also make a similar declaration. The Judges of the ECCC are bound to so act in the performance of their duties.

ADMISSIBILITY OF THE DISAGREEMENT

1. FORMAL ADMISSIBILITY

27. Internal Rule 72 governs the procedure in settling disagreements between the Co-Investigating Judges. Internal Rule 72(2) provides that "within 30 days, either Co-Investigating Judge may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges with a copy to the other Co-Investigating Judge."[27]

28. While the International Co-Investigating Judge does not indicate in the Record of Disagreement when the disagreement arose, according to the documents before us the National Co-Investigating Judge received the Proposed Rogatory Letter on 23 December 2011 and has provided no answer so far. The Reserve International Co-Investigating Judge's Record of Disagreement is dated 19 January 2012 and was notified by the Office of Administration to the Pre-Trial Chamber with a copy to the National Co-Investigating Judge on the same day of 19 January 2012. The Disagreement was, therefore, brought before the Pre-Trial Chamber within the 30 day time limit provided for in the ECCC Agreement, the ECCC Law and the Internal Rules and is therefore admissible.

2. STANDING

29. We disagree with the opinion of Judges Prak, Ney and Huot to the effect that the Reserve International Co-Investigating Judge "does not have enough qualification [or standing] to undertake his duty according to legal procedure in force."[28] While noting that Judges Prak, Ney and Huot do not provide any explanation or reasoning for their opinion, we dissagree with their conclusion.

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[27] Internal Rule 72(2) (Rev. 8)

[28] Memorandum to the Acting Director of the Office of Administration dated 3 February 2012 from Judge Prak Kimsan signing in his capacity as the President of the Pre-Trial Chamber with subject: "Returning the documents communicated to Pre-Trial Chamber by the Office of Administration" (the "Memorandum from Judge Prak Kimsan").

30. Judge Laurent Kasper-Ansermet has brought a Disagreement before the Pre-Trial Chamber under the following circumstances:

31. The former International Co-Investigating Judge Siengfried Blunk tendered his resignation on 18 October 2011. The procedure for the *appointment of a new* international Co-Investigating Judge is ongoing.[29] This procedure is, in our opinion, not related to the standing of the Reserve International Co-Investigating Judge Kasper-Ansermet to temporarily replace Judge Blunk in his capacity as the Reserve International Co-Investigating Judge. Following an absence of the appointed International Co-Investigating Judge and *in the meantime*, pursuant to the applicable law in ECCC,[30] in order to ensure that court proceedings go on timely and smoothly, the functions of the International Co-Investigating Judge shall be undertaken by the Reserve International Co-Investigating Judge.

32. Article 26 of the ECCC law is clear as it provides that where a Co-Investigating Judge is absent, which includes instances of resignation, the reserve Co-Investigating Judge shall perform the functions of the absent Co-Investigating Judge. According to this article, the conditions to be fulfilled for a judge to replace a Co-Investigating judge in the ECCC include:

1) *absence* (which includes absence due to resignation) of the appointed Co-Investigating Judge;

2) that the replacing judge has to have already been *appointed to act as a reserve* Co-Investigating Judge.

Unlike the case of the reserve Judges of the Chambers[31] or of the Investigating Judges who act in the regular Cambodian Courts,[32] in the case of the reserve Co-Investigating Judge in

[29] This procedure for *appointment in vacancy* is governed by Article 5(6) of the Agreement, Article 46 new of the ECCC Law and Internal Rule 7(4) which provides references to other provisions of the applicable law.
[30] Article 26 of the ECCC Law: "the reserve Investigating Judges shall replace the appointed Investigating judges in case of their absence."
[31] In the case of absence of the judges of the ECCC Chambers, while Art 11(2) of ECCC law provides that "The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence," Internal Rule 17(2) makes reference to Internal Rules 77, 79 and 108 which explicitly requires *designation by the President of one*

the ECCC the applicable law does not set any other conditions or require any other formalities, such as "designation" or "appointment" by "the President," to take place for the temporary replacement (which differs from appointment to fill a vacancy) of a Co-Investigating Judge by the Reserve Co-Investigating Judge during his/her absence.[33]

33. Notwithstanding the reason for his absence, it is not disputed that the appointed international Co-Investigating Judge Blunk is absent by way of his resignation. Therefore, the first condition for Article 26 of the ECCC Law to become operative is met.

34. Second, it is not disputed that Judge Kasper-Ansermet has been officially appointed and has taken an oath to act as the Reserve International Co-Investigating Judge.[34] This is a matter of public record. Therefore the second condition for Article 26 of the ECCC Law to become operative is also met. We note here that, unlike in his recent statements, the National Co-Investigating Judge You Bunleng, has previously fully supported the same view. Thus, in his statement of 15 August 2007 where while informing the public about his promotion within the Cambodian judiciary and asserting that "it [was his] duty to [also] ensure [that] there is no interruption in the process [in the ECCC's OCIJ]" Judge You stated that "the ECCC Law and the 2003 Agreement [..] ***also*** provide for the appointment of reserve Co-Investigating Judges, indicating that the possibility of change is clearly foreseen. The ECCC,

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of the Chambers for the replacement to take effect. Furthermore, we also note that the expressed meaning of replacement in the Chambers is that the replacing reserve judge, during the effective period of replacement, has the power to "express opinions" and to "make decisions" (see for instance Internal Rule 77(7)), while in Article 26 of the ECCC Law, there is no any limitation or specification of power of those replacing the Co-Investigating Judges during the effective period of replacement.

[32] Article 51 of the Code of Criminal Procedure of Cambodia provides: "When an investigating judge cannot perform his duty because of leave, illness or other reasons, another investigating judge of the same court shall be *temporarily assigned by the court president* to ensure the investigation work. If there is no investigating judge at the court, *the court president* may temporarily assign any judge of the court to conduct the judicial investigation. The *court president* renders an assignment order which cannot be appealed against." In the ECCC, which is a court of a special nature, where the establishment laws do not provide for the existence of such authority as the "Court's President" (which differs from the position of the President of any of the Chambers or of the President of the Plennary) and where there are no "other investigating judges" but instead there are "reserve investigating judges," the applicable law provides that "in the absence of the Co-Investigating Judge he or she shall be replaced by the reserve Co-Investigating Judge," and understandably does not require like in the regular Cambodinan Courts that an assignment by the court's President is necessary for the replacement. Pursuant to the ECCC Law the fact of the appointment of a Reserve Co-Investigating Judge can be seen in the context of the Code of Criminal Procedure of Cambodia as a "preassignment." In the context of the specific nature of the ECCC this is entirely logical and accounts for the fact that the Office of Co-Investigating Judges or the ECCC do not have a "President of the Office" or a "President of the Court" to make a subsequent "assignment" or "designation."

[33] By analogy see also second paragraph of Article 18 new of the ECCC Law.

[34] Public Opening Speech of President Kong Srim at the ECCC Plenary of 21 February 2011.

as any other court, has to provide for the contingency in which any national or international judge might be unable to continue their function, in exceptional circumstances."[35]

35. The fulfillment of these two conditions brings about the power of the Reserve International Co-Investigating Judge Kasper-Ansermet to act as the temporary replacement of the absent International Co-Investigating Judge Blunk until a Judge has been duly appointed, in accordance with the law, for the permanent replacement of Judge Blunk in the capacity of the International Co-Investigating Judge. If a reserve judge is not able to temporarily replace an absent judge pending his permanent replacement then one must logically inquire as to the purpose of having a Reserve Investigating Judge.

36. Therefore, we find that the Reserve International Co-Investigating Judge Kasper-Ansermet has standing to bring this Disagreement before the Pre-Trial Chamber pursuant to Internal Rule 72.

37. For all the abovementioned reasons we find that the Disagreement is admissible.

CONCLUSION:

38. As the Pre-Trial Chamber has not reached a decision on the Disagreement brought before it, Internal Rule 72(4)(d) instructs that "in accordance with Article 23 new of the ECCC Law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed." In the current case this means that the Proposed Rogatory Letter shall be executed.

Phnom Penh, 23 February 2012

Judge Rowan DOWNING **Judge Chang-Ho CHUNG**

[35] Statement by Judge You Bunleng, Co-Investigating Judge, dated 15 August 2007, fourth paragraph (*emphasis added*).

Attachment 2, 497

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

INTEROFFICE MEMORANDUM

TO: **H.E. Tony KRANH,** Date: February 03 ,2012
A: Acting Director of Office of Administration

Ref: -Letter no. 1094 ក.វ.ត.ក/Ad, dated 16 December 2011
-Letter no. 10105 ក.វ.ត.ក/ច.ប, dated 19 January 2012
-Meeting of Pre-Trial Chambers on 27 January 2012

FROM: **Mr. Prak Kimsan,**
DE: President of Pre-Trial Chamber

SUBJECT: **Returning the documents communicated to Pre-Trial Chamber by the Office**
OBJET: **of Administration**

Excellency,

With reference to above subject, Pre-Trial Chamber (PTC) on 27 January 2012 brought into meeting of the documents as mentioned in both references above. However, PTC judges have not reached their consent to take into their consideration of the substance of those documents.

Having seen that **Mr. Laurent Kasper-Ansermet** does not have enough qualification to undertake his duty according to legal procedure in force, therefore those documents—that communicated to Pre-Trial Chamber by letter no. 1094 ក.វ.ត.ក/Ad, dated 16 December 2011 and letter no. 10105 ក.វ.ត.ក/ច.ប, dated 19 January 2012— shall be returned to the Office of Administration.

Please accept, you Excellency, the assurance of my cordial consideration.